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Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—against—

OPERA ON TOUR, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

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Hallsby Press Inc.—NYC

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(1)

A Federal, and Not a Local Question, Is Involved Here.

Respondent argues that whether a labor objective is legal, is a matter of local concern; meaning that when a State Court enjoins either picketing or communication of any sort because of an illegal labor objective, the State Court is dealing with a local question and no Federal question can be involved. If this be so, then the forty-eight states can make forty-eight varied rulings on the legality of labor objectives, enjoin free speech as a result, and none of the cases could reach this Court notwithstanding the violation of the XIVth Amendment to the Constitution. The chaos which would

result from such a situation is pointed out in petitioner's brief (pp. 15, 16).

Respondent forgets that questions between labor and capital affect not only the participants in the dispute, but are matters of public concern. This Court so stated in the *Thornhill* case, 310 U. S. 88.

Neither was the labor dispute in this case a local question geographically speaking. Respondent was organized as a corporation in New York, but its activities were conducted outside of New York State, in various parts of the country (R. 570, 595, 603, 604).

If the question presented by this petition is not a Federal question, then the question in the *Wohl* case was not a Federal question, and the same would hold true of the *Thornhill* case and of the *Swing* case. Those cases, as well as the case at bar, involved freedom of speech and of assembly; and a Federal question arises where these rights, guaranteed by the Constitution, are infringed upon by a State court which says that speech may not be indulged in and the assemblies may not be had because the State Court holds that they are outside a judicially determined economic area prescribed by the individual Court. Once we concede that each of the forty-eight State Courts may prescribe for itself an area outside of which all attempts at persuasion by speech, picketing or assembly are illegal, we immediately annul the Federal guarantee of free speech.

Petitioners' brief (pp. 11, 16) points out the national importance of the question involved here, and the determined effort of the New York Court of Appeals to legislate judicially on the subject of labor objectives.

This is emphasized by the decision of that Court on July 29, 1941, after the presentation of the petition herein, in *American Guild of Musical Artists* v. *Petrillo* (286 N. Y. 226, Official Advance Sheet, September 6, 1941), where the

New York Court of Appeals reaffirmed its position taken in the instant case, saying at page 231:

> "Unless the objective of the defendant union is a lawful one, this controversy is not a 'labor dispute' in the sense of section 876-a of the Civil Practice Act. (*Opera on Tour, Inc.* v. *Weber, supra.*)"

Chief Judge Lehman again dissented (286 N. Y. saying at p. 232):

> "For the reasons stated in my dissenting opinion in the earlier case (Opera on Tour v. Weber), I felt constrained to find that the injunction 'constitutes an intrusion by the court into a field from which it is excluded under the law of the state as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution.' For the same reasons I cannot accept the decision there as a precedent for subsequent decisions. I must continue to refuse my sanction to an injunction which I regard as an intrusion by the court into a field from which, in my opinion, it is excluded by statute, by the Constitution of the State of New York and by the Constitution of the United States."

This last decision by the New York Court of Appeals makes it all the more necessary that this Court pass on the subject.

The *Thornhill* case, 310 U. S. at page 104, refers with approval to a dissenting opinion by Mr. Justice Brandeis in *Duplex Co.* v. *Deering*, 254 U. S., at page 488:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle

without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the Legislature which, while limiting the individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

(2)

The Federal Question Was Sufficiently Raised, Was Necessarily Determined and Was Actually Decided by the New York Court of Appeals.

Respondent, with petitioners' consent, has added to the Record petitioners' application to the New York Court of Appeals for a reargument, and if that be denied, then to amend the remittitur so as to affirmatively state that the Court of Appeals passed upon the Federal question here involved. The denial of that application is accompanied by no reasons therefor (R. 1296), and in no way changes the fact that a Federal question was raised by petitioners and necessarily passed upon by the Court of Appeals. That court probably felt that the opinions there filed disclosed the Federal question presented and passed upon. The Court did not say that the Federal question was not involved or was not raised. The denial of the application leaves petitioners in the same position as though the application had not been made. As our main brief shows (pp. 5, 20) the question was raised both by petitioners' counsel and respondent's counsel, at the trial and in the briefs on appeal.

The decision of the New York Court of Appeals in the *Wohl* case (284 N. Y. 788), was rendered December 31,

1940, without opinion. The instant case had been argued before that and then was awaiting decision. Because no opinion was filed in the *Wohl* case, the Court of Appeals (after this Court had denied certiorari), amended its remittitur to show that the Federal question raised by petitioners here was there presented and passed upon. There, as here, that Court upheld the propriety of an injunction, solely on the ground of an illegal labor objective. The amendment of that remittitur was after that Court's decision in the instant case, and was followed on July 29, 1941, by its decision in the *American Guild of Musical Artists'* case, again reiterating the same rule on the authority of the instant case, after this Court on June 2, 1941, granted certiorari on rehearing and reversed the judgment of the New York Court of Appeals in the *Wohl* case. There can be no question therefore that this Federal question was presented to and passed upon in this case by the Court of Appeals.

Respondent's suggestion that petitioners' answer to the complaint does not specifically raise the constitutional question, has several answers: (1) The New York practice does not require this. (2) Petitioners could not possibly anticipate the issuance of such an extraordinary injunction. (3) The question was properly and timely presented.

Lynch v. *New York,* 293 U. S. 52, is cited by respondent on the question of this Court's jurisdiction. There, however, the State Court rendered no opinion, so that this Court did not have before it the ground upon which the decision of the State Court rested. There the Record itself showed two grounds. One involved a Federal question and the other did not. The ground independent of the Federal question was sufficient in itself to sustain the State Court. This Court therefore refused to take jurisdiction. Here, however, we have only one question, and that was passed upon by the Trial Court and the State Appellate Courts. Applying

the rule quoted by respondent from the *Lynch* case, it affirmatively appears from the Record—in fact from the opinions of the Court of Appeals that a Federal question was presented to it for decision; that the Federal question was actually decided by that Court; that the judgment as rendered could not have been given without deciding it.

The writ of certiorari should be granted and the judgment of the New York Court of Appeals reversed.

Respectfully submitted,

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Attorney for Petitioners.